

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan Iqbal Chaudhry.

Constitution Petition No. D-3508 of 2018

[Riasat Ali and another versus Province of Sindh and others]

- Petitioners : Riasat Ali and Ghulam Hyder Joyo through Mr. Ali Asadullah Bullo Advocate.
- Respondents 1-4 : Governor Sindh/Chancellor & others through M/s. Shaharyar Mahar and Ali Safdar Debar, Assistant Advocate General Sindh.
- Respondent 5 : Dr. Mujeebuddin Memon, through Mr. Muhammad Arshad S. Pathan Advocate.
- Respondent 6 : Election Commission of Pakistan through Mr. Muhammad Nishat Warsi, Deputy Attorney General for Pakistan.
- Dates of hearing : 23-10-2019 & 30-10-2019
- Date of decision : 09-12-2019

JUDGMENT

Adnan Iqbal Chaudhry J. - The Petitioners, who are serving in the Sindh Agriculture University, seek a writ of *quo warranto* against extension in the tenure of the Respondent No.5 as Vice Chancellor of the said University for a further term of 4 years, which extension was made vide notification dated 10-04-2018 (the impugned notification) issued on behalf of the Governor Sindh as Chancellor of the Sindh Agriculture University.

2. Mr. Ali Asadullah Bullo, learned counsel for the Petitioners first submitted that the Vice Chancellor of an Agriculture University should necessarily be an agriculturist, whereas the Respondent No.5 was a Mechanical Engineer by qualification and hence not eligible. His second submission was that vide notification dated 11-04-2018,

the Election Commission of Pakistan [ECP] had imposed a ban on recruitment in all Government organizations w.e.f. 01-04-2018 and therefore the extension of the Respondent No.5 as Vice Chancellor on 10-04-2018 was unlawful. Mr. Bullo's third ground of the challenge was that the extension of the Respondent No.5 as Vice Chancellor was without any process of diligence, contrary to the *ratio decidendi* of *Khawaja Muhammad Asif v. Federation of Pakistan* (2013 SCMR 1205), and thus unlawful.

3. Mr. Muhammad Arshad Pathan, learned counsel for the Respondent No.5, submitted that the Sindh Agriculture University Act, 1977 did not require that the Vice Chancellor should have the credentials of an agriculturist; that the Respondent No.5 was a Mechanical Engineer by qualification and previously a Professor at the Mehran Engineering University; that to say that Mechanical Engineering had no relevance to agriculture was a misconception as the said subject/discipline was central to Agricultural Engineering and the Sindh Agriculture University had devoted an entire faculty to Agricultural Engineering; that the initial appointment of the Respondent No.5 in 2014 was made after a transparent process by a selection committee; that his extension was made on the basis of his performance; that the notification of extension had been issued prior ECP's ban on recruitment; and that the petition was *malafide* as the Petitioners had an axe to grind against the Respondent No.5.

4. Mr. Muhammad Arshad Pathan Advocate submitted that the Respondent No.5 had been appointed Vice Chancellor initially for a term of 4 years under section 27(1) of the Sindh Agriculture University Act, 1977 as amended by the Sindh Universities Laws (Amendment) Act, 2013, which provision had empowered the 'Chancellor' to extend the tenure for one more term; that the first tenure of the Respondent No.5 was to expire on 21-05-2018; therefore the impugned notification dated 10-04-2018 issued by the Chancellor extending the tenure of the Respondent No.5 as Vice Chancellor for another term of 4 years was in accord with section

27(1) of the Sindh Agriculture University Act, 1977 as amended by the Sindh Universities Laws (Amendment) Act, 2013.

5. From the comments filed on behalf of the Respondents 1 and 3, i.e., by the Additional Secretary, Governor's Secretariat, and the Secretary Universities and Boards Department, it came to light that section 27(1) of the Sindh Agriculture University Act, 1977, under which the Respondent No.5 had been initially appointed Vice Chancellor, had been materially amended by the Sindh Universities and Institutes Laws (Amendment) Act, 2014, and that the extension in the tenure of the Respondent No.5 had been made under section 27(1) of the Sindh Agriculture University Act, 1977 as amended in 2014, and not under the amending Act of 2013 as had been contended by Mr. Arshad Pathan Advocate. Therefore, vide order dated 23-10-2019 we had put all learned counsel on notice, including the learned AAG Sindh, to address the Court on the question whether extension in the tenure of the Respondent No.5 was in accord with section 27(1) of the Sindh Agriculture University Act, 1977 as amended by the Sindh Universities and Institutes Laws (Amendment) Act, 2014. That question was so raised in view of the enunciation of law by the Supreme Court of Pakistan in *Mustafa Impex v. Government of Pakistan* (PLD 2016 SC 808).

6. Heard the learned counsel and perused the record.

Mr. Bullo's first argument was that the Respondent No.5 was not an agriculturist and hence not eligible for any extension in tenure as Vice Chancellor of an Agriculture University, which extension according to him was essentially a fresh appointment. But even assuming that the extension was in the nature of a fresh appointment, no such criteria as contended by Mr. Bullo is laid down by the Sindh Agriculture University Act, 1977. In fact, at the time of the said extension the eligibility criteria prescribed by section 27(1) of the Sindh Agriculture University Act, 1977 for the appointment of a Vice Chancellor was only that the candidate "shall be an eminent academic or a distinguished administrator". Be that as it may, in the circumstances of the case we are not inclined to

entertain a challenge to the 'eligibility' of the Respondent No.5 to hold the position of Vice Chancellor when he has already completed his first tenure as Vice Chancellor and the question to his eligibility is being raised at the stage of an extension in that tenure.

7. Regards Mr. Bullo's argument that the extension in the tenure of the Respondent No.5 as Vice Chancellor of Sindh Agriculture University had been made despite a ban on recruitment imposed by the ECP under section 8(c) of the Elections Act, 2017, that does not appear to be correct. The ban had come about vide notification dated 11-04-2018; it was prospective; whereas the notification of the extension of the tenure of the Respondent No.5 had been issued before on 10-04-2018. The reliance placed by learned counsel on the date of 01-04-2018 is misconceived as that date mentioned in ECP's notification was relatable only to the exception of recruitment by the Public Service Commission where the test/interview had been conducted by 01-04-2018.

8. We now advert to the question whether the extension in the tenure of the Respondent No.5 was in accord with section 27(1) of the Sindh Agriculture University Act, 1977 as amended by the Sindh Universities and Institutes Laws (Amendment) Act, 2014.

By notification dated 22-05-2014, the Respondent No.5 was first appointed Vice Chancellor of the Sindh Agriculture University for a period of 4 years expiring on 22-05-2018. At the time, section 27(1) of the Sindh Agriculture University Act, 1977 as amended by the Sindh Universities Laws (Amendment) Act, 2013, read as follows:

"27(1) The Vice Chancellor shall be appointed by the Chancellor on the recommendation of Government for a period of four years, which may be extended for one more term on such terms and conditions as the Chancellor may determine."

Under section 9(1) of the Sindh Agriculture University Act, 1977, the Chancellor is the Governor Sindh.

On 01-01-2015, the Sindh Universities and Institutes Laws (Amendment) Act, 2014 (Sindh Act No. V of 2015) came into effect

and substituted section 27(1) of the Sindh Agriculture University Act, 1977 as follows:

“27(1) There shall be a Vice Chancellor of the University who shall be eminent academic or a distinguished administrator and shall be appointed by the Chancellor on the advice of Government, for a period of four years, which may be extended for one more term on such terms and conditions as Government may determine.”
(underlining for emphasis).

9. On 30-03-2018, a Summary was moved for the Chancellor/Governor and the Chief Minister for an extension in the tenure of the Respondent No.5 as Vice Chancellor of Sindh Agriculture University. After highlighting the previous performance of Respondent No.5, the Summary recommended as follows (underlining supplied for emphasis):

“The tenure of Dr. Mujeebuddin Memon as Vice Chancellor, Agriculture University Tandojam is going to expire on 23-05-2018.

2.

3. *Under Section 27(1) of Sindh Agriculture University Act, 1977, as amended by Sindh Universities and Laws (Amendment) Act, 2014, the Vice Chancellor of the University shall be an eminent academic or a distinguished administrator and shall be appointed by the Chancellor on the advice of Government for a period of four years which may be extended for one more term on such terms and conditions as Government may determine.*

4. *It is proposed that the Chief Minister Sindh may like to advice the Chancellor/Governor Sindh to extend one more term of four years to Prof. Dr. Mujeebuddin Memon as Vice Chancellor, Agriculture University Tandojam under section 27(1) of Sindh Agriculture University Act, 1977”.*

The Summary shows that para-4 thereof was endorsed by the Chief Minister on 04-04-2018 and the same was then placed before the Governor / Chancellor who approved the same on 09-04-2018. Subsequently, the impugned notification dated 10-04-2018 was issued on behalf of the Chancellor/Governor to extend the tenure of the Respondent No.5 as Vice Chancellor of Sindh Agriculture University for a further term of four years as follows:

“NOTIFICATION

No.GS/5-5/2014(SO-HE): In exercise of the powers vested in him under Section 27(1) of the Sindh Agriculture University Act 1977 (as amended) and on the advice of Government, the Governor Sindh/Chancellor has

been pleased to appoint Prof. Dr. Mujeebuddin Memon as Vice Chancellor, Sindh Agriculture University, Tandojam for further period of four years, w.e.f. 23rd May, 2018.

BY ORDER OF THE GOVERNOR SINDH/
CHANCELLOR

MUHAMMAD SUALEH AHMED FARUQUI
PRINCIPAL SECRETARY TO GOVERNOR SINDH

No.GS/5-5/2014(SO-HE) Karachi, the 10th April, 2018."

10. On 11-05-2018, the Sindh Universities and Institutes Laws (Amendment) Act, 2018 came into effect and again substituted section 27(1) of the Sindh Agriculture University Act, 1977 to stipulate *inter alia* that the Vice Chancellor shall be appointed by the "Chief Minister" for a period of four years, which may be extended for one more term on such terms as the "Chief Minister" may determine. Mr. Arshad Pathan, learned counsel for the Respondent No.5 attempted to argue that the Summary for the impugned notification dated 10-04-2018 had been approved by the Chief Minister in light of the fact that by that time the Bill of the amending Act of 2018 had been floated. But that argument is inherently misconceived as that Bill became law on 11-05-2018, much after the impugned notification dated 10-04-2018, and therefore the amending Act of 2018 is not relevant for the present purposes.

11. Purportedly, the impugned notification for extension in the tenure of the Respondent No.5 as Vice Chancellor, was issued pursuant to section 27(1) of the Sindh Agriculture University Act, 1977 as it then stood amended by the Sindh Universities and Institutes Laws (Amendment) Act, 2014, which stipulated that the Vice Chancellor shall be appointed by the Chancellor "on the advice of Government" for a period of four years which may be extended for one more term on such terms and conditions as "Government" may determine. Section 27(1) manifests that both the decision to appoint a Vice Chancellor and the decision to extend his tenure for one term was to taken by the "Government". Indeed, the impugned notification also states that it is issued by the Governor Sindh/Chancellor on the "advice of the Government". However,

the Summary dated 30-03-2018 pursuant to which the impugned notification was issued, shows that such advice had in fact been given to the Governor/Chancellor by the Chief Minister. The comments filed on behalf of the Respondents 1 and 3, i.e., by the Additional Secretary, Governor's Secretariat, and by the Secretary Universities & Boards Department also state that the impugned notification was issued on the advice of the Chief Minister. The question is whether such advice of the Chief Minister could be taken as the advice or decision of the 'Government'.

12. In the case of *Mustafa Impex v. Government of Pakistan* (PLD 2016 SC 808), notifications issued by the Chairman FBR acting as Secretary Revenue Division, withdrawing and modifying exemptions from sales tax granted earlier by the Federal Government, were challenged on the ground that such executive power vested only in the Federal Government. It was held by the Supreme Court that when Article 90 of the Constitution of Pakistan stipulates that the executive authority of the Federation "shall be exercised in the name of the President by the 'Federal Government', consisting of the Prime Minister and the Federal Ministers", that means that the said executive authority is to be exercised by the 'Cabinet' as a collective entity *albeit* in the name of the President. After highlighting that Article 99 of the Constitution, as it presently stands, does not envisage delegation by the Federal Government of its executive functions to officers or authorities subordinate to it, it was held by the Supreme Court that "Any Act, or statutory instrument purporting to describe any entity or organization other than the Cabinet as the Federal Government is *ultra vires* and a nullity." It was further held that though the Prime Minister is the head of the Cabinet, he is neither a substitute nor a surrogate of the Cabinet; that "The Prime Minister cannot take decisions by himself, or by supplanting or ignoring the Cabinet because the power to take decisions is vested with the Federal Government i.e. the Cabinet, and unilateral decisions taken by him would be a usurpation of power." On that interpretation of Article 90 read with Article 91(1)

of the Constitution of Pakistan, the Supreme Court also declared that the Rule 16(2) of the Rules of Business of the Federal Government, 1973, which bestows discretionary powers on the Prime Minister to bypass the Cabinet, was *ultra vires* the Constitution of Pakistan.

13. Similar to Article 90 is Article 129 of the Constitution of Pakistan which stipulates that the exercise of executive authority of the Province shall be exercised in the name of the Governor by the Provincial Government, consisting of the Chief Minister and Provincial Ministers. Therefore, applying *Mustafa Impex* it follows that pursuant to Article 129 of the Constitution, the executive authority of the Provincial Government is to be exercised by the Provincial Cabinet as a collective entity *albeit* in the name of the Governor; that when a Provincial statute, such as the Sindh Agriculture University Act, 1977, provides for the exercise of executive authority by the Provincial Government, that is to be done and the decision for that has to be taken by the Provincial Cabinet and not by the Chief Minister alone. In *Karamat Ali v. Federation of Pakistan* (PLD 2018 Sindh 8), a learned Division Bench of this Court observed that in light of *Mustafa Impex* the power of the Provincial Government to appoint the Inspector General of Police, being statutory in nature, could only be exercised by the Provincial Cabinet and that “It does not suffice, and indeed is contrary to law, for the decision to be taken elsewhere in the executive branch and then to be simply endorsed or approved by the Cabinet. The power vests only in the Cabinet and must be exercised there and nowhere else”. Again, in *Mirpurkhas Sugar Mills Ltd. v. Province of Sindh*, C.P. No.D-8591/2018 and others (unreported as yet), another learned Division Bench of this Court, while following *Mustafa Impex* and *Karamat Ali*, held that ‘Government’ in section 16 of the Sugar Factories Control Act, 1950 meant the Provincial Cabinet, and the notification thereunder fixing the minimum price of sugarcane having been issued without the prior approval of the Provincial Cabinet, was unlawful.

14. The learned AAG Sindh had attempted to distinguish *Mustafa Impex* by submitting that that pertains to the exercise of executive authority in a fiscal matter. But that submission fails to appreciate that the *ratio* of *Mustafa Impex* is in the interpretation of Articles 90 and 99 of the Constitution of Pakistan which provisions do not distinguish between types of executive authority and the subsequent Division Bench judgments by this Court in *Karamat Ali* and *Mirpurkhas Sugar Mills (supra)* by which we are also bound, are a testament to that. The other submission of the learned AAG Sindh was that under the Sindh Government Rules of Business, 1986 the advice given by the Government to the Governor in relation to appointment of Vice Chancellors of Universities is to be given by the Chief Minister. That submission too stands addressed by *Mustafa Impex* where it was observed that no refuge can be taken under the Rules Business if those are contrary to the Constitutional mandate.

15. Thus, having seen that the word "Government" in section 27(1) of the Sindh Agriculture University Act, 1977, as it stood amended at the relevant time by the Sindh Universities and Institutes Laws (Amendment) Act, 2014, could only mean the 'Provincial Cabinet', the decision to extend the tenure of the Respondent No.5 as Vice Chancellor for another term, and the terms and conditions of such extension, had to be taken by the Provincial Cabinet and not by the Chief Minister in isolation of the Provincial Cabinet. For these reasons we allow this petition by declaring that the impugned notification dated 10-04-2018 extending the tenure of the Respondent No.5 as Vice Chancellor of the Sindh Agriculture University, was issued without lawful authority and is therefore set-aside.

Petition stand allowed as above. Pending application stands disposed of accordingly.

JUDGE

JUDGE

KARACHI
DATED: 09-12-2019